Supreme Court of the United States

OCTOBER TERM, 1966

No. 649

JACKIE WASHINGTON, PETITIONER

vs.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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[fol. 1]

CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY, TEXAS

January Term, 1965

THE STATE OF TEXAS

vs.

JACKIE WASHINGTON

* * * *

EXCERPT FROM STATEMENT OF FACTS

* * * *

[fol. 2]

* * * *

APPEARANCES:

FOR THE STATE:

HON. HENRY WADE, Criminal District Attorney of Dallas County, Texas, by:

HON. JIM ZIMMERMANN AND HON. MIKE EVERETT

FOR THE DEFENDANT:

HON. HOWARD LAW AND HON. TOM PURNELL, Texas Bank Building, Dallas, Texas.

BE IT REMEMBERED, that upon trial of the above entitled and numbered cause held on the 19th day of March, A. D., 1965, before HIS HONOR, JUDGE JOHN MEAD, and a jury, the following proceedings were had:

* * * *

[fol. 3]

COLLOQUY BETWEEN COURT AND COUNSEL

MR. ZIMMERMANN: Your Honor, ladies and gentlemen of the jury, that is the case for the State of Texas and we rest our case in chief.

THE COURT: The State rests in chief.

MR. LAW: May we proceed?

THE COURT: Proceed.

MR. LAW: Sheriff, we would like for you to produce Charles Fuller as a witness for the Defense. And, Your [fol. 4] Honor, we have another witness in the hall, too.

(A brief conference was had between Counsel and the Court out of the hearing of the jury.)

MR. LAW: Will you call Charles Ellis?

THE COURT: Put your objection in the record, Counsel.

MR. ZIMMERMANN: Now comes the State of Texas and objects to the calling of Charles Fuller by the Defense as a witness for the reason that Charles Fuller is currently under conviction for the crime of murder arising out of the same set of facts as Jackie Washington.

THE COURT: Go ahead.

* * * *

[fol. 5]

IN CRIMINAL DISTRICT COURT NUMBER FOUR
DALLAS COUNTY, TEXAS

January Term, 1965

No. E-7925-K

THE STATE OF TEXAS

vs.

JACKIE WASHINGTON

EXCERPT FROM AMENDED MOTION FOR NEW TRIAL—
Filed July 15, 1965

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Defendant in the above entitled and numbered cause with leave of Court first had and obtained,

said Court for good cause shown having extended the time for filing and amending the Motion for New Trial, with express leave of Court files this his Amended Motion for New Trial in lieu and in place of his prior Amended Motion for New Trial herein and moves the Court to set aside the verdict of the jury herein rendered against him and to grant him a new trial for the following reasons:

* * * *

[fol. 6] VI.

Because this Defendant was denied compulsory process for obtaining witnesses in his favor in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States and the Texas Constitution by the refusal of the Court to permit the Defendant to call as a witness in this cause, Charles Fuller, a co-defendant previously convicted as aforesaid, said Fuller then and there being available in the Dallas County Jail and, who, if permitted to testify would have stated that Defendant attempted, both verbally and physically, to prevent him, Fuller, from using the weapon that caused the death of deceased and that, upon failing in his efforts, Defendant left the scene before the fatal shot was fired.

* * * *

WHEREFORE, PREMISES CONSIDERED, Defendant prays that this Court set aside the verdict herein rendered against him and grant him a new trial herein.

/s/ Charles W. Tessmer
CHARLES W. TESSMER

/s/ Emmett Colvin, Jr.
EMMETT COLVIN, JR.
Attorneys for Defendant
706 Main Street, Suite 400
Dallas, Texas 75202

[fol. 7]

IN THE CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY, TEXAS

[Title Omitted]

FORMAL BILL OF EXCEPTION NO. 1—Filed Aug. 17, 1965

BE IT REMEMBERED that upon the trial of the above styled and numbered cause, the Defendant offered the testimony of the Co-Defendant, Charles Fuller, who had been previously tried and convicted in this Court for the crime of murder with malice arising out of the same transaction as in this cause, the jury assessing his, Fuller's, punishment at fifty (50) years in the penitentiary, and the State objected to the calling of said Fuller to the stand to testify in behalf of Defendant for the reason that said Fuller was currently under conviction for the crime of murder arising out of the same set of facts as Defendant, and this Court sustained the objection of the State and refused to permit the Defendant to call the said Fuller, in violation of Defendant's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

BE IT FURTHER REMEMBERED that again upon the hearing on Defendant's Amended Motion For New Trial the Defendant offered the testimony of said Fuller, and upon objection by the State, was denied the right to call said Fuller to the stand and to offer his, Fuller's, testimony, in violation of Defendant's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States; that if, he, Fuller, had been permitted to testify, said Fuller, according to his Affidavit, admitted into evidence at said hearing would have stated:

"My name is Charles Fuller and I reside at Dallas County Jail. Telephone ————. I wish to to
[fol. 8] make the following statement of my own free will and accord, which to the best of my knowledge and belief is true and correct:

'I was indicted along with Jackie Washington for shooting a boy named Herman Vassel. I was tried and got 50 years before Jackie's trial. On the night Jackie Washington and the rest of the follows and I went to Jean Carter's house, 3 of the boys went in front of the house before Jack and I got near there, and, after throwing rocks at the house, they ran off. Jackie and I were walking fairly slow. He had the shotgun at first, but I took it from him and he continued to walk with me. When we got close to the house Jackie said "Let's go.", and tried to get me to leave. I wish to God I had left because all I really wanted to do was scare the people in Jean's house. After Jackie tried to get me to leave and pulledat me, he finally turned and ran.. I continued on to the front of Jean's house and shot at the front porch. I don't know what got into me because I never really intended to hit anyone—just scare. That's all any of us even talked about doing that night—just to scare Jean. Jackie shouldn't have been convicted because If I had listened to him that night when he wanted us both to leave, I wouldn't have shot anyone.'";

there being no witness to confirm or deny Defendant's statement and testimony at the trial of this cause that he had abandoned the project and tried to get Fuller to desist when he recognized that Fuller was intent upon killing rather than frightening someone, the testimony of said Co-Defendant. Fuller, was vital to the defense of [fol. 9] Defendant but, in apparent reliance upon Article 711, V.A.C.C.P., this Court refused to permit the testimony of said Co-Defendant to be offered in behalf of Defendant at the trial of this cause and at the hearing on Defendant' Amended Motion For New Trial, all in violation of Defendant's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States.

To all of which action of the Court the Defendant then and there excepted and here now tenders his Bill of Exception No. 1 and asks that the same be approved, allowed, signed by the Court and filed as a part of the record in this case.

/s/ CHARLES W. TESSMER
CHARLES W. TESSMER

/s/ EMMETT COLVIN, JR.
EMMETT COLVIN, JR.
Attorneys for Defendant
706 Main Street, Suite 400
Dallas, Texas 75202
RI8-3433 RI7-5893

The above and foregoing Bill of Exception is approved by the Court on this the day of ....., 1965, and ordered filed by the Clerk.

[File Endorsement Omitted in Printing]

[fol. 10]

IN THE CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY, TEXAS

[Title Omitted]

JUDGE'S QUALIFICATIONS AND APPROVAL—Aug. 25, 1965

Defendant's Bill of Exception No. 1 is explained and qualified as follows.

In Defendant's Bill of Exception No. 1 page 1 and page 2 wherein the defendant states that said defendant, Jackie Washington, was denied a fair trial and that his rights were violated under the Sixth and Fourteenth Amendments to the Constitution of the United States, it is merely a contention of law by the defendant which the Court does now certify to be merely a contention of law by the defendant but the Court does not certify it herein as a fact. And the Court would further explain and qualify the said Bill by Reference to Article 711, V.A.C.C.P., where in Texas Law prohibits a Co-Defendant being called by the defense as a witness.

With the above qualifications and explanations Defendant's Bill of Exception No. 1 is approved and ordered filed as a part of the record in this case, this the 25th day of August, 1965.

/s/ JOHN MEAD
JOHN MEAD
Judge
Criminal District Court No. 4
Dallas County, Texas

The foregoing Bill of Exception is accepted by the defendant as approved and qualified by the Court.

Emmett Colin Jr.

Attorney for Defendant

[File Endorsement Omitted in Printing]

[fol. 11]

IN THE CRIMINAL DISTRICT COURT NO. 4
DALLAS COUNTY, TEXAS

January Term, 1965

* * * *

THE STATE OF TEXAS

vs.

JACKIE WASHINGTON

EXCERPTS FROM HEARING ON MOTION FOR NEW TRIAL

[fol. 12]

* * * *

APPEARANCES:

FOR THE STATE:

HON. HENRY WADE, Criminal District Attorney of Dallas County, Texas, by:

HON. JIM MILLER AND HON. JIM ZIMMERMANN

FOR THE DEFENDANT:

HON. CHARLES W. TESSMER AND HON. EMMETT COLVIN, JR., 706 Main Street, Suite 400, Dallas, Texas, 75202.

BE IT REMEMBERED, that upon a hearing on the amended motion for a new trial of the above entitled and numbered cause held on the 27th day of May, A. D., 1965, before HIS HONOR, JUDGE JOHN MEAD, the following proceedings were had:

[fol. 13]

* * * *

COLLOQUY BETWEEN COURT AND COUNSEL

MR. COLVIN: If the Court please, turning now to paragraph five and six of the Motion, we call now Charles Dewayne Fuller.

MR. MILLER: To which the State of Texas objects, Your Honor, as not having any materiality to the question involved in this motion for a new trial: That Charles Fuller is under indictment and under conviction for the facts arising out of this same case and that the matters which the Defense Counsel has set forth in his motion for new trial are such a defensive matter that the testimony which they wish to offer here was no more admissible than it was in the trial of Jackie Washington; that Charles Fuller is not a competent witness for the Defendant in his trial for murder on the issue; and that any testimony that Charles Fuller would give is not admissible for this Defendant upon his trial and, therefore, it is not anymore admissible in this Hearing to show whether or not the man had a fair and impartial trial and that it is completely a matter of defensive testimony which, if called, would have been offered before the jury and which the [fol. 14] law does not allow. And we object not only to his calling Charles Fuller and placing Charles Fuller on the stand and allowing him to testify in this Hearing.

THE COURT: Is that all?

MR. MILLER: Yes, sir.

THE COURT: Your request that he be called as a witness was with reference to paragraphs five and six?

MR. COLVIN: Paragraphs five and six, Your Honor.

THE COURT: Sustain the objection.

MR. COLVIN: If the Court please, note our exception at this time on the ground that the Statutes involved are unconstitutional for the reason that they violate the Defendant's—and have violated the Defendant's rights—to a fair and impartial trial in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States, and I would like to, at this time, Your Honor,—can we stipulate, Mr. Miller, that at the trial of this case,

that Mr. Law did call—uh—the co-Defendant, Charles Fuller?

MR. MILLER: Would you like to do that just by reference and incorporate the page numbers?

[fol. 15] MR. COLVIN: Yes.

MR. MILLER: I, of course, will stipulate that that fact did occur because it did.

MR. COLVIN: If the Court please, we would like to stipulate into this record the Statement of Facts of the testimony in this Cause, page 248—.

THE COURT: Is that because it's a little hazy there?

MR. COLVIN: Well, we just want it in this record here.

THE COURT: All right.

MR. COLVIN: —beginning with Line 21, I beg your pardon—beginning at Line 18 through Line 25; and again, on page 249, Lines 1 through Line 14. It is stipulated and agreed by and between Counsel for the State and Counsel for the Defendant that the record therein quoted is incorporated in the record of this Hearing by reference for all pertinent purposes.

MR. MILLER: To which we so stipulate.

THE COURT: It will be admitted into evidence.

MR. COLVIN: If the Court please, in connection with [fol. 16] the perfection of my bill, I would like to make offer of proof as to what the person, Charles Fuller, whose indictment along with Jackie Washington would testify to were he permitted to testify in court today—.

MR. MILLER: Well, now, Judge—

THE COURT: Let him finish. Let him finish.

MR. MILLER: Oh, I am sorry.

MR. COLVIN: I would make this offer, Your Honor, to perfect my Bill of Exception.

THE COURT: You're offering what he would testify to if here?

MR. COLVIN: Yes, Your Honor.

THE COURT: Is that for the purposes of the record?

MR. TESSMER: At the present time, we would offer, Your Honor, to show what he would testify to were he permitted, and no statement at all about him not being a competent witness. Otherwise, I believe that it is a

denial of the Defendant's right to perfect a Bill of Exception. We're not offering the testimony at this time; we are offering what he would say if we were permitted to call him.

THE COURT: I understand the distinction.

[fol. 17] MR. TESSMER: If he were here and if he were competent and the State is wrong about him not being competent. It is unconstitutional under the Fourteenth Amendment, because this prevents the accused of having access to all available evidence.

MR. MILLER: May I say something to this?

THE COURT: I'm going to give you an opportunity, but time is not of the essence. When they sit down, then you stand up. They are both through now.

MR. MILLER: We would like to point out to the Court here, sir, that I think if the Court will take judicial knowledge, or whatever that is, that the person that they refer to there, Charles Fuller, testified in his own trial and it would seem to me that whatever he would testify or whatever they want to perfect is set forth in the testimony of Charles Fuller in his own trial where he testified fully as to the circumstances and facts, thoughts, and feelings and everything else. It doesn't seem, I don't quite understand the distinction here, why, when this man has testified in an open court and specifically has entered sworn testimony in a trial which has a perfect record and has testified to certain facts which facts, as set forth in [fol. 18] the amended motion for new trial, do not show and did not exist in the testimony of his own trial. And for the attorneys to stipulate and offer here an unsworn statement as to what this man would testify to, if it is set forth here in their amended motion for new trial, comparably to what they want to or are going to offer, the Court is familiar with what they say there, what Fuller would testify to, is not what he testified to in his own trial.

THE COURT: What are they offering?

MR. MILLER: In relation to his amended motion, what he sets forth in there, the statements he makes in that amended motion pertaining to this. It is paragraph three. No, it is not. It's paragraph six.

THE COURT: Is that what you're offering it for in perfecting your Bill in relation to paragraph six?

MR. COLVIN: In relation to paragraph five and six, Your Honor. No, I beg your pardon, Your Honor. Paragraph six. Your Honor, I would like to make my verbal offer of proofs at this time.

THE COURT: I sustain that. Sustain the objection. [fol. 19] MR. COLVIN: You sustain the objection and will not permit my verbal offer of proofs?

THE COURT: That's right. When you say, "verbal offer of proof," you mean you want me to have Fuller brought down and put on the stand to testify, is that right?

MR. COLVIN: No, Your Honor, you've already passed on that. What we're offering now, Your Honor, is a verbal offer of proof as to what Charles Fuller would testify to if he were brought down into the courtroom in order to perfect our Bill.

THE COURT: Show me what you have to offer.

MR. COLVIN: I have an affidavit here, Your Honor, and I was going to make a verbal offer of proof to get that into the record.

THE COURT: Does the State have a copy of this?

MR. MILLER: No, sir.

MR. COLVIN: I haven't offered it.

MR. MILLER: Do you have any objections if we look at it?

THE COURT: Well, you've confused the Court when you say you have a verbal offer and here you have an [fol. 20] affidavit. Are you going to offer this to perfect your Bill, is that what you're talking about?

MR. COLVIN: We are going to make a verbal offer of proof, Your Honor, on the testimony of Charles Fuller.

THE COURT: What do you mean by "verbal offer of proof?" I don't understand what you mean by "verbal offer of proof."

MR. COLVIN: We'll read into the record what he would testify to were he here.

THE COURT: From this statement I hold in my hands signed allegedly by Charles D. Fuller, is that right—is that your verbal offer of proof?

MR. TESSMER: Your Honor, he is already ruled not a competent witness; therefore, we would want the testimony to show that were he a competent witness, that what he would have to say might be material to this lawsuit. That's all.

THE COURT: I understand that, Counsel. What's the difference in calling the man in here and you making a verbal offer of proof, what's the difference? If you want to perfect your Bill, what's the difference in calling him in here and putting him on the stand and reading the [fol. 21] affidavit? What's the difference?

MR. TESSMER: Your Honor has already ruled that we're not permitted to call him.

THE COURT: No. What's the difference—my position is that to perfect your Bill, you're saying to me that the same thing you're offering in writing is what he would say in person; I don't see the distinction in the matter. If I rule he's not competent to come down here and testify in person, I see the distinction that you want to perfect your Bill, I haven't ruled yet on the verbal offer of proof, but I want to see the distinction in my mind of the difference between the verbal offer of proof and him testifying in person. If one is valid, it seems like the other would be valid. I may let you get that in the record for the purposes of appeal. I don't know. I haven't ruled on it.

MR. COLVIN: I'll ask the Reporter to mark the statement of Charles Fuller dated May the 26th, 1965, as Defendant's Exhibit Number 5 for identification.

MR. MILLER: Are you offering it now?

MR. COLVIN: We offer it.

THE COURT: For the purposes of perfecting your Bill?

[fol. 22] MR. COLVIN: That is correct.

THE COURT: You understand I've already ruled that he's not competent to come down here and testify and you're saying to me now you have a statement, something about a verbal offer of proof, and you're saying, in order to perfect your Bill, that you have a statement here from Fuller to show what he would say if he were here, if the Court is wrong in not permitting you to call him, is that correct?

MR. COLVIN: That is correct.
MR. MILLER: That's right.
THE COURT: He would testify to this if he were here?
MR. TESSMER: And if he were competent.
THE COURT: The State has no objections to this?
MR. MILLER: No, sir.
THE COURT: Admit it into evidence for that purpose of perfecting the Defendant's Bill.
MR. MILLER: Also, would the Court take judicial knowledge that Charles Fuller was convicted in his case—indicted and was convicted?
[fol. 23] THE COURT: I'll take judicial knowledge; I tried the case, I know that. The case has been tried—put this in the record, Mr. Reporter, that I presided at this trial and that he was convicted and as far as I know, he is serving his time since it has not been appealed.
MR. COLVIN: We'll be glad to stipulate, Your Honor, that Charles Fuller was convicted and received a fifty year sentence.
THE COURT: Good.

* * * *

[fol. 24]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
APPEAL FROM DALLAS COUNTY

No. 38,873

* * * *

JACKIE WASHINGTON, APPELLANT

vs.

THE STATE OF TEXAS, APPELLEE

OPINION—Jan. 5, 1966

The conviction is for murder; the punishment, fifty years.
This is a companion cause to Fuller v. State, No. 38,873, dated January 5, 1966, not yet reported.

It is undisputed that the deceased was killed when he was shot with a shotgun about 2 A.M., Saturday, August 30th.

The testimony of the state reveals that on August 29, Jean Carter, age 17, lived with her mother and grandfather; that she had known the appellant, age 18, three or four years, and had previously dated him without the knowledge of her mother who had forbidden it; that she had known the deceased about three weeks before August 29, and had seen him during the last week except Tuesday night; that she went to see the appellant on Wednesday, August 26, at his grandmother's and they went to a friend's house, and then she returned home about noon; that she had visited him numerous times before at his grandmother's; that her mother left home about 1 P.M., and her grandfather about 4:30 P.M.; that the appellant telephoned about 4:30 P.M. and wanted her to met him at the store nearby but she declined. Jean further testified that she telephoned the deceased about 6:30 P.M., and that they were together that night and returned home about midnight; that about 2 A.M. while she and her mother were doing some housework and the deceased was sitting in the house but visible from the outside, they heard some noise which caused the deceased to go out on the porch and then she heard a shot, and the deceased said he had been shot and the police were notified.

Mrs. Ruby Bynum testified that she was a next-door neighbor of Jean Carter, her mother and grandfather; that from her kitchen window about 4:30 P.M., August 29, she saw the appellant with an open knife gripped in [fol. 25] his hand go from the front porch of the Carter house to the side door, and when no one responded he returned to the front door and after getting no response he slammed the door and kicked the screen, and on returning to the side door repeated the same acts. She further testified that after a shot from a gun awoke her early Sunday, August 30, she saw a man lying on Carter's front porch and heard him cry for help.

The testimony further reflects that shortly after 11 P.M., August 29, the appellant, driving his car, began asking different persons at various places about a gun,

and still unable to locate a gun, with several boys in the car, he said as they passed Carter's house where a 1964 yellow Impala was parked in the driveway that "if he had a gun he could blow him out of that chair"; later, appellant's inquiry of another person failed to locate a gun, and then he asked Charles Fuller who let him have a shotgun but he had no shells, and next he asked W. E. Thomas who gave him some shells, and Thomas joined the group which made seven in the car. After getting the shells the appellant drove directly to a place near the Carter house where he parked. Appellant handed two of the boys a brick while the other boy got one, and he told them to hit the car in the driveway, and when "that boy" came out he would shoot him. Two boys remained in the car, and appellant with the gun, Fuller next, followed by the three with the bricks went to the Carter house. After the three threw the bricks, and while returning to the car, they heard a shot, and shortly the appellant with Fuller carrying the gun returned and they drove away. Lorinzo Mabry, one of the two boys who remained in the car during the shooting, testified that he heard the appellant tell his mother, "Yes, I shot him," referring to the deceased.

A physician, who examined the body of the deceased, testified that the projectiles from the shotgun pierced his lungs, the heart and stomach, and his death was caused by the gunshot wound.

[fol. 26] The appellant, testifying in his own behalf, and other defense witnesses stated that Fuller was drunk, and while on the way from the car to the Carter house Fuller took the gun from him (appellant), and the other three boys ran toward the Carter house and threw the bricks, hitting the car in the driveway; that after Fuller approached the house he, appellant wanted to leave but that Fuller insisted that he was going to shoot somebody, and while running toward the car he (appellant) heard the gun discharge and a woman scream, but Fuller denied shooting a woman after he got to the car. A defense witness testified, that appellant returned to the car first with Fuller close behind with the gun.

Appellant insists that the trial court erred in refusing his motion for new trial which alleged that the jurors

heard discussions in the hallway of the courthouse before they were selected as jurors that his co-defendant, Fuller, had been previously assessed fifty years; and that during their deliberation at least one juror said he heard that Fuller received fifty years.

In support of his motion the appellant called only juror Hoffman, the foreman. He testified that after he was selected but before the jury was completed he heard a juror say that Fuller got fifteen years; that during deliberation he heard a juror say that he had heard that Fuller got fifty years, and he (Hoffman) said he had heard something else, and he then said that it had no bearing on this case and never heard it mentioned again. The affidavits of two jurors were introduced by appellant; that of Gregory recited that he heard Fuller was convicted but no mention was made of the extent of the punishment assessed; and that of Blakeslee recited that after a remark that Fuller got fifty years the foreman advised that Fuller's penalty was immaterial and nothing further was said about it.

The state introduced the affidavits of five jurors which state that they never heard or that they never had any [fol. 27] knowledge of the punishment assessed Fuller; another affidavit states that the juror did not remember anything specifically that was said about Fuller's sentence, and two others state that they thought and another stated that Fuller got fifty years but when they were told it had no bearing it was not mentioned again. The state's affidavits of jurors Blakeslee and Gregory were introduced but appellant had already introduced those given to him.

There was testimony during the trial from several witnesses that Fuller had been previously tried. A statement was made before the jury by one of the attorneys that Fuller was "under conviction" for the same offense; and the law which permits the state to call Fuller, who is "under conviction," as a witness but that appellant could not, was discussed in the jury argument.

It is concluded that the trial court did not abuse its discretion in overruling the motion for new trial.

It is contended that the trial court erred in refusing his requested charge on the corroboration of accomplice testimony for the state and as to inculpatory statements of accomplices testifying for the appellant.

No exception was reserved to the court's action, therefore the refusal of the requested charge is not properly presented for review. Massiate v. State, 365 S.W.2d 802; Thomas v. State, 387 S.W.2d 665; Faulkner v. State, 390 S.W.2d 754.

The appellant contends that he was denied his constitutional right to have compulsory process for obtaining witnesses in his favor, namely, his co-defendant, Fuller, who had been previously convicted under a separate indictment for the same transaction.

The record shows that the appellant and Fuller were co-indictees for the same offense, and the court refused appellant's request to call Fuller as a witness following the state's objection thereto.

The legislature has the power, except as limited by the constitution, to prescribe the competency of witnesses in all cases.

[fol. 28] The Arts. 711 C.C.P. and 82, P.C., have welded to them the severance statutes (Arts. 650, 651, 652, 653 and 654 C.C.P.) which provide the means and procedure for obtaining the testimony of accomplice witnesses. These statutes are procedural only, and do not deprive the accused of any constitutional right. No cases declaring Arts. 711 and 82, supra, unconstitutional are cited and we are aware of none.

The evidence is sufficient to support the conviction and no error appearing, the judgment is affirmed.

BELCHER
Judge

[SEAL]

(Delivered January 5, 1966)

Opinion approved by the Court

• • • •

[fol. 29]

IN THE COURT OF CRIMINAL APPEALS

* * * *

ORDER OVERRULING MOTION FOR REHEARING—
Feb. 23, 1966

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify, in Cause No. 38,873 styled:

JACKIE WASHINGTON, APPELLANT

v.

TEXAS, APPELLEE

that Appellant's Motion for Rehearing was Overruled Without Written Opinion on February 23, 1966.

WITNESS my hand and Seal of said Court this 26th day of October A. D. 1966.

[SEAL]

/s/ Glenn Haynes
GLENN HAYNES
Clerk
Court of Criminal Appeals of Texas

[fol. 30]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

* * * *

OPINION ON APPELLANT'S SECOND MOTION FOR REHEARING—March 30, 1966

Appellant challenges the accuracy of our original opinion wherein we said: "The affidavits of two jurors were

introduced by appellant; that of Gregory recited that he heard Fuller was convicted but no mention was made of the extent of the punishment assessed;—"

The affidavit referred to in the opinion was introduced in evidence as Defendant's Exhibit No. 2 and reads: "I was a member of the jury in Cause No. E-7925-K, styled The State of Texas v. Jackie Washington, in Criminal District Court No. 4 of Dallas County, Texas. Some time during the period which I was confined as a juror I recall a remark concerning the co-defendant's case, to the effect that he had been convicted. I recall no mention as to the number of years he was sentenced. This remark in no way effected my judgment as a juror."

Appellant directs our attention to the affidavit of the same juror (Gregory) which the state introduced as its Exhibit 13. It reads: "I was a member of the jury in the Jackie Washington murder case. I did not hear what punishment was assessed any other person who was connected with Washington in this case. I did not know what punishment was assessed any other such person and I arrived at my verdict without knowledge or consideration of what punishment any other person connected with the case may have received."

We remain convinced that under the record the trial judge did not abuse his discretion in overruling appellant's motion for new trial.

Appellant's second motion for rehearing is overruled.

[SEAL]

WOODLEY
Judge

(Delivered March 30, 1966.)

A TRUE COPY

Attest:

/s/ Glenn Haynes
GLENN HAYNES
Clerk,
Court of Criminal Appeals of Texas

[fol. 31]

SUPREME COURT OF THE UNITED STATES

No. 168 Misc., October Term, 1966

JACKIE WASHINGTON, PETITIONER

v.

TEXAS

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition which reads as follows:

"1. Is Petitioner's conviction and sentence void because he was denied his rights under the Sixth and Fourteenth Amendments to to the Constitution of the United States to have compulsory process in obtaining an available witness in his favor, namely a Co-Defendant, charged and previously convicted under a separate indictment for the same transaction and which Co-Defendant, according to his Affidavit, could have exonerated Petitioner if such testimony were believed by the jury?"

The case is transferred to the appellate docket as No. 649 and placed on the summary calender.

October 10, 1966

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SUPREME COURT, U. S.
JAN 16 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 649

JACKIE WASHINGTON,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

BRIEF FOR PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 649

JACKIE WASHINGTON,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Criminal Appeals for the State of Texas (R. 14-20) is reported at 400 S.W.2d 756 (1966).

Jurisdiction

The judgment of the Court of Criminal Appeals for the State of Texas was entered on January 5, 1966 (R. 18). Motion for Rehearing was overruled without written opinion on February 23, 1966 (R. 19). Second Motion for Rehearing was denied by written opinion on March 30, 1966. Petition for Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis were filed and docketed as

Number 1667 Misc., October Term, 1965, on May 7, 1966. On October 10, 1966, the Petition for Writ of Certiorari and the Motion to Proceed in Forma Pauperis were granted as to Question 1 presented by the Petition (R. 21). The jurisdiction of this Court rests upon 28 U.S.C., Section 1257(3).

Question Presented

Is Petitioner's conviction and sentence void because he was denied his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States to have compulsory process in obtaining an available witness in his favor, namely, a Co-Defendant, charged and previously convicted under a separate indictment for the same transaction and which Co-Defendant, according to his Affidavit, could have exonerated Petitioner if such testimony were believed by the jury?

Statutes Involved

Article 82 of the Texas Penal Code provided as of the dates involved in this case:

"Parties to offense as witnesses

Persons charged as principals, accomplices or accessories, whether in the same or by different indictments, can not be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others."

Article 711 of the Code of Criminal Procedure of 1925 provided as of the dates involved in this case:

"Principals, accomplices or accessories

Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others."

Statement

The proceedings at the State Trial of the cause and the evidence may be summarized as follows (references being made to the certified Statement of Facts [State Record of Testimony]):

The Petitioner was convicted in Criminal District Court Number 4 of Dallas County, Texas, of the offense of murder with malice. The jury assessed his punishment at fifty (50) years confinement in the penitentiary.

The State's evidence is reflected as follows: The Petitioner, a negro boy, had previously dated one Jean Carter but subsequently her mother had forbidden such dates (S.F. 76). This, coupled with the fact that she was dating another boy (the Deceased), apparently gave rise to some jealousy upon the part of Petitioner, and he, Petitioner, in the company of several boys on the night of August 29, 1964, began driving around Dallas, Texas, with the expressed intent of locating some sort of weapon with which to scare the girl and her then current boyfriend, the Deceased (S.F. 159-161; 172). Apparently, the plot was to scare someone and not to shoot anyone (S.F. 159; 160-161; 164-165; 216, lines 14-16). This drive to various

places in the City of Dallas ultimately led to Charles Fuller (a Co-Defendant tried separately and the recipient of a fifty [50] year penitentiary punishment), who had a shotgun (S.F. 128), and the parties, then consisting of six (6) boys, did obtain the gun of Charles Fuller (S.F. 128-129). After the consumption of some time in the successful search for shotgun shells (S.F. 131-137), the boys, having been joined by one W. E. Thomas (the supplier of the shotgun shells), drove to the vicinity of the Warren Street address of Jean Carter (S.F. 138-139). Apparently, Fuller, Petitioner, and three (3) of the boys got out, with Thomas and Mabry remaining in the parked automobile (S.F. 140). These five (5) boys walked through an alley to Warren Street (S.F. 141) and then the three (3) boys preceded Petitioner and Fuller to the front of Jean Carter's home, threw bricks toward the house, ran down the street, and circled back to the car before the return of Petitioner and Fuller (S.F. 142-155). At the time the bricks were thrown, Jean, her date (the Deceased), and her family were in the house preparing to eat a late supper (S.F. 63-66). The sound of the bricks caused the mother of Jean and the Deceased to run out onto the front porch and turn on the porch light (S.F. 67-71). At this point, a shotgun blast hit Deceased in the side fatally wounding him (S.F. 72-76), and thereby causing his death according to Dr. Sidney Stewart.

There were no witnesses identifying the person who fired the fatal shot, except, according to the evidence, that person was either Petitioner or Fuller. A few minutes after the return of the other three (3) boys to the automobile (S.F. 154), Petitioner and Fuller came running down the alley (S.F. 155), and they all drove away (S.F. 156). When

Petitioner and Fuller returned to the car, Petitioner said that Fuller had shot Mrs. Marion Carter (the mother of Jean) (S.F. 165), and Petitioner was angry at Fuller because he had shot the gun at someone, saying that he, Fuller, was "trigger happy". The State offered evidence reflecting a prior intent of Petitioner to apparently shoot or harm the Deceased (S.F. 98; 99; 124, line 1; 147, line 8). But the State's evidence was conflicting (S.F. 200; 216, lines 14-16; 217, line 24; 288, lines 24-25; 219). The testimony of State witnesses, Eaton and Mabry, was ambiguous; they being the only State witnesses testifying to the chain of events, the remaining State witnesses not having seen or identified the participants.

Lorenzo Mabry, testifying for the State, stated that he saw the Petitioner the next day and, advising Petitioner that the Police were after him, the Petitioner, Petitioner denied having done anything (S.F. 206, line 15). However, he further testified that Petitioner called one Billy Bradley and told her that if anyone came by the house to tell him that he, Petitioner, had spent the night with her (S.F. 206). The evidence further reflected that the witness, Mabry, gave a signed statement to the Police in which he stated that Petitioner told him on the afternoon of the next day that he, Petitioner, "shot a woman last night" (S.F. 209, line 13), which statement was denied on the stand by such witness.

The Petitioner, testifying in his own behalf, and other defense witnesses stated that the Co-Defendant, Fuller, was drunk (S.F. 347), that Fuller took the gun from him, the Petitioner (S.F. 259; 283; 349), and that the other three (3) boys ran toward the house on Warren Street (S.F. 350). The Petitioner further testified that after Fuller

approached the house that he, Petitioner, wanted to leave but that Fuller insisted that he was going to shoot somebody (S.F. 352, lines 6-7), and that, after trying unsuccessfully to get Fuller to leave, the Petitioner began running back toward the automobile (S.F. 352). Petitioner stated that he had just rounded the corner at the alley when he heard the gun go off and a woman's scream (S.F. 353-354). Petitioner stated that he had seen Mrs. Carter stick her head out of the door of the house just before he began running and that he thought at the time that Fuller had shot Mrs. Carter (S.F. 354), but that Fuller denied shooting a woman after he came running back to the car behind Petitioner (S.F. 355). One (1) defense witness remembered Petitioner returned to the car first, with Fuller close behind with the gun (S.F. 284).

There being no witness to affirm or deny Petitioner's statement that he abandoned the project and tried to get Fuller to desist when he recognized that Fuller was intent upon killing rather than frightening someone, the testimony of the Co-Defendant, Fuller, was obviously vital to the defense of Petitioner. However, in apparent reliance upon Article 711, Code of Criminal Procedure of 1925, the Trial Court Judge refused to permit the testimony of the Co-Defendant to be offered in behalf of Petitioner at the trial (S.F. 248, lines 23-25; 249, lines 1-14) (R. 2-7); the substance of such testimony being reflected by the Affidavit of such Co-Defendant admitted in evidence at the hearing on the Motion for New Trial (R. 8-14).

Summary of Argument

To deny an accused the right to an available fact witness, in the form of the Co-Defendant, vital to his defense, strikes at the heart of due process. The dead hand of the common law has no rational basis and is but a remnant of an age since passed. To suppress by statute evidence from a witness that is vital to an accused, while declaring the same witness competent to testify for the State, renders the accused a victim of a paradoxical deprivation of due process. The aim of the due process requirement—the essence of the Sixth and Fourteenth Amendments to the Constitution of the United States—is not to eliminate presumptively false evidence but to prevent fundamental unfairness in the use of evidence whether true or false.

ARGUMENT

The Petitioner's Conviction and Sentence Is Void Because He Was Denied His Rights Under the Sixth and Fourteenth Amendments to the Constitution of the United States to Have Compulsory Process in Obtaining an Available Witness in His Favor, Namely, a Co-Defendant, Charged and Previously Convicted Under a Separate Indictment for the Same Transaction, and Which Co-Defendant, According to His Affidavit, Could Have Exonerated Petitioner If Such Testimony Were Offered to and Believed by the Jury.

As reflected by Petitioner's Formal Bill of Exception (R. 4-7), Petitioner offered the testimony of the Co-Defendant, Charles Fuller, who had been previously tried and convicted in the same Trial Court for the crime of

murder with malice arising out of the same transaction. The jury assessed Fuller's punishment at fifty (50) years in the penitentiary. The opinion on appeal in Fuller's case is reported in *Fuller* v. *State*, 397 S.W.2d 434 (Tex. Crim. App. 1966).

The State objected to the calling of Fuller for the reason that Fuller was currently under the aforesaid conviction. The Court, in reliance upon Article 82, Texas Penal Code, and Article 711, Texas Code of Criminal Procedure of 1925, sustained the objection of the State, thereby depriving Petitioner the use of Fuller as a witness in his behalf. A reoccurrence of the violation of Petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States occurred at the time of Petitioner's hearing on his Amended Motion for New Trial. The Trial Court, however, permitted Petitioner to make his offer of proof in the form of an Affidavit from Fuller reflecting that Petitioner attempted, just prior to the shooting, to make Fuller desist, and, when unable to do so, Petitioner turned and ran prior to the actual shooting (R. 8-14). Thus is brought into focus the question as to whether or not Article 711, Texas Code of Criminal Procedure of 1925, and Article 82, Texas Penal Code, deprived Petitioner of his right to have compulsory process to obtain a witness in his favor under the Sixth and Fourteenth Amendments to the Constitution of the United States.

Some clarification must necessarily be made as to the Opinion written by the Texas Court of Criminal Appeals on original submission, wherein it is stated:

> "The Arts. 711, C.C.P. and 82, P.C., have welded to them the severance statutes (Arts. 650, 651, 652, 653

and 654, C.C.P.) which provide the means and procedure for obtaining the testimony of accomplice witnesses."

It was stated to the Texas Court of Criminal Appeals in Petitioner's brief in support of his Second Motion for Rehearing that the statement of the Texas Appellate Court with regard to the availability of the severance statutes is completely invalid. This is so because in order to use the applicable severance statute, the Petitioner would have had to file a false affidavit and his attorney would have had to suborn the filing of such false affidavit. Under the only conceivably applicable severance statute, Article 651, Texas Code of Criminal Procedure of 1925, a Motion thereunder to be sufficient must be supported by an affidavit, and that affidavit must state (1) that the evidence of such other party is material for the defense of the affiant, and (2) that affiant believes that there is not sufficient evidence against said party to secure such party's conviction. See, cases collected, 2 Branch's Texas Penal Code, 2d Ed., Section 763, page 80. In light of the fact that the testimony of Petitioner and the Affidavit of his Co-Defendant, Fuller, reflects guilt of such Co-Defendant, Petitioner could not truthfully make such an Affidavit. Further, insofar as severance is concerned under the law of the State of Texas, Petitioner could never use his Co-Defendant's testimony until the Co-Defendant served his fifty (50) year sentence. But this, of course, would be of no aid to Petitioner since a severance statute does not operate to merely continue a case. *Nichols* v. *State,* 231 S.W.2d 425 (Tex. Crim. App.). Even assuming that Petitioner could have falsely obtained a severance—what would be the result? The Co-Defendant would be tried first; and he was so tried first in this in-

stance. While the Texas Appellate Court's position is plainly fallacious, no response was made by that Court to Petitioner's foregoing expressed summary of the Texas law relating to severances.

Petitioner would bring to the Court's attention the fact that Article 711 of the Texas Code of Criminal Procedure of 1925, and Article 82 of the Texas Penal Code, were, by implication, repealed by Articles 36.09 and 38.10 of the Texas Code of Criminal Procedure of 1965 (effective January 1, 1966). The latter Articles, providing that a Co-Defendant may testify on behalf of another Co-Defendant, being inconsistent and irreconcilable with Articles 711 and 82, repealed such Articles by operation of the rules of statutory construction as set forth by the Texas Court of Criminal Appeals, *Parshall* v. *State,* 138 S.W. 759 (1911); *Espalin* v. *State,* 237 S.W. 274 (1921), and the Supreme Court of Texas, *Townsend* v. *Terrell,* 118 Tex. 463, 16 S.W.2d 1063 (1929); *Popham* v. *Patterson,* 121 Tex. 615, 51 S.W.2d 680 (1932). These rules of statutory construction are binding upon this Court. *Standard Oil Company* v. *New Jersey,* 341 U.S. 428 (1950); *United States* v. *Burnison,* 339 U.S. 87 (1949); *Winters* v. *New York,* 333 U.S. 507 (1947).

Although this Court does not sit to decide arguments after events have put them to rest, *United States* v. *Alaska Steamship Company,* 253 U.S. 113 (1919), such a situation is not here presented by the repeal of Articles 711 and 82. Petitioner was tried and convicted of murder in 1965, for a crime committed in 1964. Articles 36.09 and 38.10 of the 1965 Code of Criminal Procedure have no application to Petitioner's rights at the time of his trial. As an individual directly aggrieved by the legislation in question,

Petitioner may properly urge the unconstitutionality of such legislation before this Court. *Barrows* v. *Jackson,* 346 U.S. 249 (1953); *Massachusetts* v. *Mellon,* 262 U.S. 447 (1923); *Citizens National Bank* v. *Kentucky,* 217 U.S. 443 (1909). Two fundamental rights embodied in the Sixth Amendment to the Constitution of the United States have been recently applied to the States. The right of the accused to be represented by counsel in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and the right of the accused to examine witnesses against him in *Pointer* v. *Texas,* 380 U.S. 400 (1965), have now been recognized. Is it less imperative upon the States that the accused have the right to call witnesses in his own behalf to aid in the presentation of the truth? Is access by an accused to witnesses in his own behalf inherent in the concept of due process?

At the time of Petitioner's trial in 1965, Articles 711 and 82 represented some of the last vestiges in the United States of the common law concept of the incompetency of witnesses interested in the result of litigation (see, Appendix A). While the original common law jury system underwent a complete evolutionary cycle, from the choosing of jurors for their knowledge of the cause obtained prior to the trial to their lack of knowledge of the facts of the case, the competency of witnesses was to emerge in an altogether different manner; as observed by Mr. Justice Brennan in detailing the law's struggle for the competency of the criminal defendant as a witness in *Ferguson* v. *Georgia,* 365 U.S. 570 (1961).

The emergence of the criminal co-defendant came about in a likewise slow manner. In the early case of *United States* v. *Reid,* 12 How. 361 (1851), wherein two persons were jointly indicted for murder on the high seas and

tried separately, it was held that they were incompetent witnesses on behalf of each other. In reaching this decision, the Court applied the common law in existence at the passage of the Judiciary Act in 1789 as the law to be followed by the Federal Courts. In *Benson* v. *United States,* 146 U.S. 325 (1892), two persons were jointly indicted for murder. The Government sought to enjoin the testimony of one of the co-defendants by citing *Reid* as controlling. The *Benson* Court, however, declined to follow the reasoning of *Reid* and re-examined the question of competency in the light of "general authority and sound reason." 146 U.S. at 335. After establishing that the theory of the common law was to admit to the witness stand only those presumably honest, appreciative of the sanctity of the oath, unaffected as a party by the result, and free from the temptation of interest, the Court said:

> "But . . . today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness, those matters which heretofore were ruled sufficient to justify exclusion." 146 U.S. at 335.

In *Rosen* v. *United States,* 245 U.S. 467 (1917), this Court emphasized that the dead hand of the common law should have no application in the determination of the competency of witnesses.

> "In the almost twenty years which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more

> likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent; with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." 245 U.S. at 471.

By 1933, an evolution had indeed taken place. In holding that a co-defendant was a competent witness in *Funk* v. *United States,* 290 U.S. 371, it was stated:

> "Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances." 290 U.S. at 380.

It is observed then, that the common law feared the injection of false testimony on the part of an interested witness and, therefore, called for his exclusion from the witness stand. But with this common law anxiety discarded in favor of the search for truth, what purpose can Articles 711 and 82 serve but to suppress the truth?

Petitioner relies upon *Brady* v. *Maryland,* 373 U.S. 83 (1963). Brady and a companion were indicted for felony murder. Brady was tried first, convicted and sentenced to death. Prior to trial his attorney requested the prosecution to allow him to examine the extrajudicial statements of Brady's companion. Several of such statements were

exhibited to him by the prosecution, but the one containing the admission of the actual homicide was withheld. Not until after Brady was sentenced did his attorney gain knowledge of such admission. A motion for new trial was overruled, as was a petition for post-conviction relief. On appeal, the Maryland Court of Appeals held that the suppression of evidence by the prosecution denied the Petitioner due process of law, and remanded the case for retrial of the issue of punishment only. On Certiorari, this Court affirmed the Maryland Court's decision that even had the confession of the other defendant " . . . been in evidence, nothing in it could have reduced appellant Brady's offense below murder in the first degree." This Court held that suppression of evidence favorable to the accused is sufficient of itself to amount to a denial of due process. 373 U.S. at 104. If " . . . [T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears," 373 U.S. at 104, is not a State statute which suppresses the introduction of evidence favorable to the accused likewise a denial of due process? We think it is.

While States are free to prescribe rules of evidence, the due process clause of the Constitution is a limitation upon the power of the legislature in enactment of statutory rules of evidence in criminal cases. *Tot* v. *United States*, 319 U.S. 463 (1943); *United States* v. *Delia*, 319 U.S. 463 (1943); *Salsburg* v. *Maryland*, 346 U.S. 545 (1953).

The aim of the requirement of due process in a criminal trial is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false. *Lisenba* v. *California*, 314 U.S. 219 (1941), reh. den. 315 U.S. 826.

> "The fundamental basis upon which all results of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth." *Funk* v. *United States,* 290 U.S. at 381.

These two statutes go further than the mere suppression of evidence favorable to an accused. They provide that notwithstanding the fact that a co-defendant is incompetent to testify on behalf of another co-defendant, he is competent to testify for the State of Texas against the defendant. While the Petitioner has no standing to attack the provisions of Articles 711 and 82, allowing the Co-Defendant to testify as a competent witness for the State, under the same circumstances in which the Co-Defendant is disrobed of that competency to testify on behalf of the Defendant, it is Petitioner's contention that these diametrically opposed provisions are so inextricably intertwined as to render Petitioner the victim of a paradoxical deprivation of due process. Is the co-defendant presumed to testify to the truth when he is a witness for the State and conversely presumed to perjure himself when testifying on behalf of another co-defendant? While this appears incredibly capricious and arbitrary, the statutes are susceptible of no other interpretation.

A defendant in a criminal proceeding is a competent witness on his own behalf and a statute declaring him incompetent is unconstitutional as violative of the due process clause of the Fourteenth Amendment to the Constitution. *Ferguson* v. *Georgia,* 365 U.S. 570 (1961), concurring opinions of Justices Frankfurter and Clark (the majority of the Court being unable to entertain an attack on Georgia's incompetency statute since *Ferguson,* in their opinion, had

not properly perfected the error, 365 U.S. at 572, footnote 1). As stated by this Court in *Funk* v. *United States,* 290 U.S. 371 at 379:

> "It seems difficult to escape the conclusion that the specific ground upon which the Court (in *Benson*) rested its determination as to the competency of the co-defendant was that, since the defendant had been rendered competent, the competency of the co-defendant followed as a natural consequence."

The original unamended Constitution contained no provision relating to compulsory process for witnesses in behalf of a criminal accused.

> "But as soon as the public attention was called to the fact that the securities for a fair and impartial trial by jury in criminal cases had not been inserted among the cardinal principles of the new government, they hastened to amend it, and to secure to a party accused of an offense against the United States the same mode of trial, and the same mode of proceeding, that had been previously established and practiced in the courts of the several States.
>
> "It was for this purpose that the 5th and 6th amendments were added to the Constitution. The 6th amendment provides that, in all criminal prosecutions, the party accused shall be entitled to a trial by jury, to be confronted with the witnesses against him, to have compulsory process for the witnesses in his favor, and to have the aid of counsel in his defense." *Reid* v. *United States,* 12 How. at 365.

We deal here with a fundamental right—the right of the Petitioner to present the truth in defense of criminal charges against him. For a State to deny him access to a witness capable of presenting that truth to a jury is to indulge in an "unsatisfactory remnant of an age gone by," Mr. Justice Clark, dissenting in *Ferguson* v. *Georgia*, 365 U.S. at 602, denying Petitioner due process of law.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Dated: January 3, 1967.

Respectfully submitted,

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APPENDIX A

States Allowing Co-Defendant Testimony

1. *Arizona*
   Rev. Stat. Ann., 1956, §13-163
2. *Arkansas*
   Stat., 1947 Ann., §43-2017
3. *California*
   Pen. Code, §1321
4. *Colorado*
   Rev. Stat. Ann., 1953, §39-7-15; §153-1-1
5. *Connecticut*
   Gen. Stat., 1958, §52-145
6. *Delaware*
   Code Ann., 1953, Tit. 10, §4302
7. *Florida*
   Stat., 1959, §932.31
8. *Georgia*
   Code Ann., 1960, Tit. 38-1603
9. *Hawaii*
   Rev. Laws, 1955, §222-14
10. *Idaho*
    Code Ann., 1948, §19-3003
11. *Illinois*
    Ann. Stat., 1964, 38 §155-1

States Holding Co-Defendant Incompetent

1. *Alabama*
   Code, 1940 Tit. 15, §303
2. *Alaska*
   Stat., 1962, §12.20.060
3. *Kansas*
   Gen. Stat. Ann., 1963, §62-1440
4. *Nebraska*
   Rev. Stat., 1959, §29-2011
5. *South Dakota*
   Code, 1939, §34.3626
6. *Texas*
   C.C.P. 711
7. *Wyoming*
   Stat., 1957, §7-244

States Allowing Co-Defendant Testimony

12. *Indiana*
    Ann. Stat., 1956, §9-1603
13. *Iowa*
    Code Ann., 1956, §781.12
14. *Kentucky*
    Rev. Stat. Ann., 1963, §421.200; §421.210
15. *Louisiana*
    Rev. Stat., 1950, §15.474
16. *Maine*
    Rev. Stat. Ann., 1964, §15-1315
17. *Maryland*
    Ann. Code, 1957, Art. 35, §1
18. *Massachusetts*
    Gen. Laws Ann., 1959, C. 233, §20
19. *Michigan*
    Comp. Laws, 1948, §27A-2158
20. *Minnesota*
    Stat., 1957, §595.02
21. *Mississippi*
    Code Ann., 1942, §§1688, 1693
22. *Missouri*
    Rev. Stat., 1959, §546.260
23. *Montana*
    Rev. Code Ann., 1947, §94-8804
24. *Nevada*
    Rev. Stat., 1956, §175.170
25. *New Hampshire*
    Rev. Stat. Ann., 1955, §§516.32, 516.33

States Allowing
Co-Defendant Testimony

26. *New Jersey*
Rev. Stat., 1951, §2A:81-1

27. *New Mexico*
Stat. Ann., 1953, §§20-1-6; 20-1-8

28. *New York*
Code Cr. Proc., §393-a

29. *North Carolina*
Gen. Stat., 1953, §8-50

30. *North Dakota*
Rev. Code, 1953, §31-01-01

31. *Ohio*
Rev. Code Ann., 1953, §2945.42

32. *Oklahoma*
Stat., 1951, Tit. 22, §701

33. *Oregon*
Rev. Stat., 1953, §139.315

34. *Pennsylvania*
Stat. 1964, Tit. 19, §681

35. *Rhode Island*
Gen. Laws Ann., 1956, §§12-17-9; 9-17-15

36. *South Carolina*
Code, 1962, §26-405

37. *Tennessee*
Code Ann., 1955, §40-2402

38. *Utah*
Code Ann., 1953, §77-44-6

39. *Vermont*
Stat. Ann., 1959, Tit. 13, §6601; Tit. 12, §1608

States Allowing
Co-Defendant Testimony

40. *Virginia*
Code Ann., 1950, §19.1-264

41. *Washington*
Rev. Ann., 1951, §§5.60.020; 5.60.030; 5.60.050

42. *West Virginia*
Code, 1961, §§5730; 5731

43. *Wisconsin*
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 649

JACKIE WASHINGTON,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Is Petitioner's conviction and sentence void because he was denied his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States to have compulsory process in obtaining an available witness in his favor, namely, a Co-Defendant, charged and previously convicted under a separate indictment for the same transaction and which Co-Defendant, according to his Affidavit, could have exonerated Petitioner if such testimony were believed by the jury?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article 82 of the Texas Penal Code provided as of the dates involved in this case:

"Parties to offense as witnesses

Persons charged as principals, accomplices or accessories, whether in the same or by different indictments, cannot be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others."

Article 711 of the Code of Criminal Procedure of 1925 provided as of the dates involved in this case:

"Principals, accomplices or accessories

Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others."

The Sixth Amendment to the Constitution of the United States provides in part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

STATEMENT OF THE CASE

Respondent sees no useful purpose in setting forth an involved statement of facts. Of importance to this Court is the fact that the Trial Court refused to permit the Co-Defendant of Petitioner to testify over the objection of State's counsel on the trial of the cause. Trial Court's refusal was based on Article 711 of the Code of Criminal Procedure of 1925, *supra*.

SUMMARY OF ARGUMENT

Petitioner was not denied his Sixth Amendment

right to compulsory process because such right extends only to obtaining witnesses *in his favor*. The State of Texas, pursuant to its inherent sovereign powers, has established a procedural rule of evidence which in no way violates any provision of the Constitution of the United States.

ARGUMENT

Petitioner, in his brief, places principle reliance on the case of *Funk v. United States*, 290 U.S. 371 (1933). *Funk v. United States* was a case which was written on the question of whether or not a wife was competent to testify as a witness in behalf of her husband on a criminal trial in the United States District Court. The actions of the United States District Court were to be governed by the common law, and the opinion in *Funk* determined the status of the *common law* at the time of the trial.

At page 377 of the *Funk* opinion the following appears.

> "It is well to pause at this point to state a little more concisely what was held in these cases. It will be noted, in the first place, that the decision in the Reid Case *was not based upon any express statutory provision.*" (Emphasis added.)

Again at page 379 the opinion in *Funk* states:

> "Taking the two cases together, it is plain enough that the ultimate doctrine announced is that in the taking of testimony in criminal cases, the federal courts are bound by the rules of the common law as they existed at a definitely specified time in the respective states, *unless Congress has otherotherwise provided.*" (Emphasis added.)

And again at page 383 of the *Funk* opinion:

"The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, *in the complete absence of congressional legislation on the subject*, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." (Emphasis added.)

Thus we see that the *Funk* opinion clearly recognizes the right of a legislative body to establish a rule and only stands as authority for interpretation of the common law as it existed at the time of the decision and which was applicable in the *Funk* case. In the instant case, we have a definite statutory provision which ruled the testimony of a co-defendant unavailable on behalf of the Petitioner.

Petitioner does not herein claim that he attempted to issue processes to obtain a witness and that such process was itself refused. Petitioner's Co-Defendant was produced in court but his testimony was not permitted because the statutory provision of Article 711 of the Code of Criminal Procedure of 1925 prohibited the Co-Defendant from appearing in favor of the Petitioner. Clear reading of the Sixth Amendment to the Constitution of the United States shows that its purpose is to provide the compulsory process, *not favorable witnesses.*

Respondent urges the Court that this cause should be governed by the principles enunciated in

Nos. 68, 69, and 70.—October Term, 1966.

Cause No. 68 Leon Spencer, Appellant v. State of Texas	On Appeal From the Court of Criminal Appeals of Texas.
Cause No. 69 Robert A. Bell, Jr., Petitioner v. State of Texas	On Writ of Certiorari to the Court of Criminal Appeals of Texas.
Cause No. 70 William Everett Reed, Petitioner v. George J. Beto, Director, Texas Department of Corrections.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

all of which were delivered by this Court on January 23, 1967, and are not yet reported.

At page 9 of the Court's Opinion the following appears:

> "Cases in this Court have long acted on the premise that the Due Process Clause guarantees the fundamental elements of fairness in a criminal trial. See, e.g., *Tumey v. Ohio*, 273 U.S. 510; *Betts v. Brady*, 316 U.S. 455; cf. *Gideon v. Wainwright*, 372 U.S. 335; see *Estes v. Texas*, 381 U.S. 532; *Sheppard v. Maxwell*, 384 U.S. 333; cf. *Grif-*

fin v. Illinois, 351 U.S. 12. But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority. In the face of the legitimate state purpose and the long-standing and widespread use that attend the procedure under attack here, we find it impossible to say that because of the possibility of some collateral prejudice the Texas procedure is rendered unconstitutional under the Due Process Clause as it has been interpreted and applied in our past cases. As Mr. Justice Cardozo had occasion to remark, a state rule of law 'does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.' *Snyder v. Massachusetts,* 291 U.S. 97, 105. See also *Buchalter v. New York,* 319 U.S. 427."

And at page 14 the following appears:

"To take such a step would be quite beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the Constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution, which these rules are not."

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully urges the Court to affirm the Judgment below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Howard M. Fender, Assistant Attorney General of the State of Texas, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above captioned cause on behalf of the Respondent; I further certify that a copy of the foregoing Brief for the Respondent has been forwarded by United States Mails, first class, postage prepaid, to Mr. Charles W. Tessmer, 706 Main Street, Suite 400, Dallas, Texas 75202, Mr. Henry J. Novak, Jr., 706 Main Street, Suite 400, Dallas, Texas 75202, Mr. Emmett Colvin, Jr., Waldie, McDowell and Colvin, 1115

Fidelity Building, 1000 Main Street, Dallas, Texas 75202, Attorneys for Petitioner, this the 7 day of February, 1967.

Howard M. Fender

HOWARD M. FENDER
Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

No. 649.—October Term, 1966.

Jackie Washington, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[June 12, 1967.]

Mr. Chief Justice Warren delivered the opinion of the Court.

We granted certiorari in this case to determine whether the right of a defendant in a criminal case under the Sixth Amendment [1] to have compulsory process for obtaining witnesses in his favor is applicable to the States through the Fourteenth Amendment,[2] and whether that right was violated by a state procedural statute providing that persons charged as principals, accomplices, or accessories in the same crime cannot be introduced as witnesses for each other.

Petitioner Jackie Washington was convicted in Dallas County, Texas, of murder with malice and was sentenced by a jury to 50 years in prison. The prosecution's evidence showed that petitioner, an 18-year-old youth, had dated a girl named Jean Carter until her mother had forbidden her to see him. The girl thereafter began dating another boy, the deceased. Evidently motivated

[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

[2] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

by jealousy, petitioner with several other boys began driving around the City of Dallas on the night of August 29, 1964, looking for a gun. The search eventually led to one Charles Fuller, who joined the group with his shotgun. After obtaining some shells from another source, the group of boys proceeded to Jean Carter's home, where Jean, her family and the deceased were having supper. Some of the boys threw bricks at the house and then ran back to the car, leaving petitioner and Fuller alone in front of the house with the shotgun. At the sound of the bricks the deceased and Jean Carter's mother rushed out on the porch to investigate. The shotgun was fired by either petitioner or Fuller, and the deceased was fatally wounded. Shortly afterward petitioner and Fuller came running back to the car where the other boys waited, with Fuller carrying the shotgun.

Petitioner testified on his own behalf. He claimed that Fuller, who was intoxicated, had taken the gun from him, and that he had unsuccessfully tried to persuade Fuller to leave before the shooting. Fuller had insisted that he was going to shoot someone, and petitioner had run back to the automobile. He saw the girl's mother come out of the door as he began running, and he subsequently heard the shot. At the time, he had thought that Fuller had shot the woman. In support of his version of the facts, petitioner offered the testimony of Fuller. The record indicates that Fuller would have testified that petitioner pulled at him and tried to persuade him to leave, and that petitioner ran before Fuller fired the fatal shot.

It is undisputed that Fuller's testimony would have been relevant and material, and that it was vital to the defense. Fuller was the only person other than petitioner who knew exactly who had fired the shotgun and whether petitioner had at the last minute attempted to prevent the shooting. Fuller, however, had been previously convicted of the same murder and sentenced to

50 years in prison,[3] and he was confined in the Dallas County jail. Two Texas statutes provided at the time of the trial in this case that persons charged or convicted as co-participants in the same crime could not testify for one another,[4] although there was no bar to their testifying for the State.[5] On the basis of these statutes the trial judge sustained the State's objection and refused to

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[3] See *Fuller* v. *State*, 397 S. W. 2d 434 (Tex. Crim. App. 1966).

[4] "Persons charged as principals, accomplices, or accessories, whether in the same or by different indictments, cannot be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others." Tex. Pen. Code, Art. 82.

"Persons charged as principals, accomplices, or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others." Tex. Code Crim. Proc., Art. 711 (1925).

These statutory provisions were apparently repealed by implication by Art. 36.09 of the Texas Code of Criminal Procedure of 1965, which became effective after petitioner's trial. Article 36.09 provides that "Two or more defendants who are jointly or separately indicted or complained against for the same offense or an offense growing out of the same transaction may be, in the discretion of the court, tried jointly or separately as to one or more defendants; provided that in any event either defendant may testify for the other or on behalf of the State. . . ."

Counsel have cited no statutes from other jurisdictions, and we have found none, that flatly disqualify co-participants in a crime from testifying for each other regardless of whether they are tried jointly or separately. To be distinguished are statutes providing that one of two or more defendants tried jointly may, if the evidence against him is insufficient, be entitled to an immediate acquittal so he may testify for the others. These statutes seem designed to allow such joint defendants to testify without incriminating themselves. See, *e. g.*, Ala. Code, Tit. 15, § 309 (1958); Alaska Code Crim. Proc. § 12.20.060 (1962); Kan. Stat. Ann. § 62–1440 (1964).

[5] *Rangel* v. *State*, 3 Tex. Crim. 642, 3 S. W. 788 (1887).

allow Fuller to testify. Petitioner's conviction followed, and it was upheld on appeal by the Texas Court of Criminal Appeals. 400 S. W. 2d 756. We granted certiorari. 385 U. S. 812. We reverse.

I.

We have not previously been called upon to decide whether the right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the Due Process Clause of the Fourteenth Amendment.[6] At one time, it was thought that the Sixth Amendment had no application to state criminal trials.[7] That view no longer prevails, and in recent years we have increasingly looked to the specific guaranties of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law. We have held that due process requires that the accused have the assistance of counsel for his defense,[8] that he be confronted with the witnesses against him,[9] and that he have the right to a speedy[10] and public[11] trial.

The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in *In re Oliver*, 333 U. S. 257 (1948),

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[6] "(A) provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." *Gideon* v. *Wainwright*, 372 U. S. 335, 342 (1963).

[7] See *West* v. *Louisiana*, 194 U. S. 258, 264 (1904).

[8] *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

[9] *Pointer* v. *Texas*, 380 U. S. 400 (1965).

[10] *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967).

[11] *In re Oliver*, 333 U. S. 257 (1948).

to describe what it regarded as the most basic ingredients of due process of law. It observed that:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic to our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." 333 U. S., at 273 (footnote omitted).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

II.

Since the right to compulsory process is applicable in this state proceeding, the question remains whether it was violated in the circumstances of this case. The testimony of Charles Fuller was denied to the defense not because the State refused to compel his attendance, but because a state statute made his testimony inadmissible whether he was present in the courtroom or not. We are thus called upon to decide whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witnesses on the stand, as well as the right to compel their attendance in court. The resolution of this question requires some discussion of the common-law context in which the Sixth Amendment was adopted.

Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all.[12] Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787,[13] the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

Despite the abolition of the rule generally disqualifying defense witnesses, the common law retained a number of restrictions on witnesses who were physically and mentally capable of testifying. To the extent that they were applicable, they had the same effect of suppressing the truth that the general proscription had had. Defendants and codefendants were among the large class of witnesses disqualified from testifying on the ground of interest.[14] A party to a civil or criminal case was not allowed to testify on his own behalf for fear that he might be tempted to lie. Although originally the disqualification of a codefendant appears to have been based only on his status as a party to the action, and in

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[12] 3 Story, Commentaries on the Constitution of the United States §§ 1786–1788 (1st ed. 1833).

[13] By 1701 the accused in both treason and felony cases was allowed to produce witnesses who could testify under oath. See 2 Wigmore, Evidence § 575, at 685–686 (3d ed. 1940).

[14] See generally 2 Wigmore §§ 575–576. We have discussed elsewhere the gradual demise of the common-law rule prohibiting defendants from testifying in their own behalf. See *Ferguson* v. *Georgia*, 365 U. S. 570 (1961).

some jurisdictions coindictees were allowed to testify for or against each other if granted separate trials,[15] other jurisdictions came to the view that accomplices or coindictees were incompetent to testify at least in favor of each other even at separate trials, and in spite of statutes making a defendant competent to testify in his own behalf.[16] It was thought that if two persons charged with the same crime were allowed to testify on behalf of each other, "each would try to swear the other out of the charge." [17] This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the courts' interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue.[18]

The federal courts followed the common-law restrictions for a time, despite the Sixth Amendment. In *United States* v. *Reid*, 12 How. 360 (1852), the question was whether one of two defendants jointly indicted for murder on the high seas could call the other as a witness. Although this Court expressly recognized that the Sixth Amendment was designed to abolish some of the harsh rules of the common law, particularly includ-

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[15] See 2 Wigmore § 580, at pp. 709–710; *Henderson* v. *State*, 70 Ala. 23, 24–25 (1881); *Allen* v. *State*, 10 Ohio St. 287, 303 (1859).

[16] See *Foster* v. *State*, 45 Ark. 328 (1885); *State* v. *Drake*, 11 Ore. 396, 4 Pac. 1204 (1884). Both cases have been repealed by statute. Ark. Stat. Ann. § 43–2017 (1947); Ore. Rev. Stat. § 139.315 (1953).

[17] *Benson* v. *United States*, 146 U. S. 325, 335 (1892).

[18] "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors." *Benson* v. *United States*, 146 U. S. 325, 336 (1892).

ing the refusal to allow the defendant in a serious criminal case to present witnesses in his defense,[19] it held that the rules of evidence in the federal courts were those in force in the various States at the time of the passage of the Judiciary Act of 1789, including the disqualification of defendants indicted together. The holding in *United States* v. *Reid* was not satisfactory to later generations, however, and in 1918 this Court expressly overruled it, refusing to be bound by "the dead hand of the common law rule of 1789," and taking note of "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court. . . ." *Rosen* v. *United States*, 245 U. S. 467, 471 (1918).

Although *Rosen* v. *United States* rested on nonconstitutional grounds, we believe that its reasoning was required by the Sixth Amendment. In light of the common-law history, and in view of the recognition in the *Reid* case that the Sixth Amendment was designed in part to make a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit

[19] 12 How., at 363–364.

perjury. The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant.[20] Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large. Moreover, under the Texas statutes the accused accomplice is no longer disqualified if he is acquitted at his own trial. Presumably, he would then be free to testify on behalf of his comrade, secure in the knowledge that he could incriminate himself as freely as he liked in his testimony, since he could not again be prosecuted for the same offense. The Texas law leaves him free to testify when he has a great incentive to perjury, and bars his testimony in situations when he has a lesser motive to lie.

We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense.[21]

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[20] See n. 5, *supra*.

[21] Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them.

The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 649.—October Term, 1966.

Jackie Washington, Petitioner, v. State of Texas.	On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[June 12, 1967.]

Mr. Justice Harlan, concurring in the result.

For reasons that I have stated in my concurring opinions in *Gideon* v. *Wainwright*, 372 U. S. 335, 349, and *Pointer* v. *Texas*, 380 U. S. 400, 408, and in my dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497, 539–545, I cannot accept the view that the Due Process Clause of the Fourteenth Amendment "incorporates," in its terms, the specific provisions of the Bill of Rights. In my view the Due Process Clause is not reducible to "a series of isolated points," but is rather "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Poe* v. *Ullman*, *supra*, at 543; see *Palko* v. *Connecticut*, 302 U. S. 319; *Klopfer* v. *North Carolina*, 386 U. S. 213, 226 (concurring opinion).

I concur in the result in this case because I believe that the State may not constitutionally forbid the petitioner, a criminal defendant, from introducing on his own behalf the important testimony of one indicted in connection with the same offense, who would not, however, be barred from testifying if called by the prosecution. Texas has put forward no justification for this type of discrimination between the prosecution and the defense in the ability to call the same person as a witness, and I can think of none.

In my opinion this is not, then, really a problem of "compulsory process" at all, although the Court's in-

corporationist approach leads it to strain this constitutional provision to reach this peculiar statute. Neither is it a situation in which the State has determined, as a matter of valid state evidentiary law, on the basis of general experience with a particular class of persons, as for example, the mentally incompetent [1] or those previously convicted of perjury,[2] that the pursuit of truth is best served by an across-the-board disqualification as witnesses of persons of that class. Compare *Spencer* v. *Texas*, — U. S. —. This is rather a case in which the State has recognized as relevant and competent the testimony of this type of witness, but arbitrarily barred its use by the defendant. This, I think, the Due Process Clause forbids.

On this premise I concur in the reversal of the judgment of conviction.

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[1] *E. g.*, California Code Civil Procedure § 1880 (1); California Penal Code § 1321.

[2] *E. g.*, Vermont Stat. Ann. § 1608. See generally 2 Wigmore, Evidence § 488 (1940 ed.).